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in the Supreme Court of the United States

October Term, 1968

No. 1252

MRS. JOHN DE RAISMES STOREY, et al
Petitioners,

vs.

WILLIAM T. MAYO, Chairman, and EDWIN L. MASON, and JERRY W. CARTER, Commissioners, as and constituting the FLORIDA PUBLIC SERVICE COMMISSION.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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MIAMI REVIEW — 371-4853 — 377-3721

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners, Mrs. JOHN DE RAISMES STOREY, et al, by and through their undersigned attorney, respectfully petition this Honorable Court to issue a writ of certiorari to review the judgment of the Supreme Court of Florida entered on November 6, 1968, and the order of the same Court denying rehearing entered on December 12, 1968.

OPINION BELOW

The opinion of the Supreme Court of Florida of which review is sought is STOREY et al v. MAYO et al and is reported in 217 So.2d 304 and reprinted in Appendix A of this Petition.

JURISDICTION

On December 12, 1968, the Supreme Court of Florida denied Petitioners' Petition for Rehearing (Appendix B), thereby making its judgment final (Appendix C). On March 6, 1969, the Supreme Court of the United States extended Petitioners time to file this petition up to and including April 11, 1969. (Appendix D). In the Petition for Writ of Certiorari filed in the Supreme Court of Florida the constitutional issues of due process and equal protection of law under the 14th Amendment of the United States Constitution were raised. In Petitioners' Petition for Rehearing the equal protection clause of this Amendment was again raised. Accordingly, jurisdiction in this cause is conferred on the Supreme Court of the United States under 28 U.S.C.A. Section 1257(3).

QUESTIONS PRESENTED

I

WHETHER OR NOT PETITIONERS, NON-MUNICIPAL RESIDENTS PRESENTLY UNDER THE CONTINUING REGULATORY PROTECTION OF THE FLORIDA PUBLIC SERVICE COMMISSION, HAVE A LEGALLY PROTECTED INTEREST IN SUCH CONTIN-

UING REGULATION UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II

WHETHER OR NOT THE STATE OF FLORIDA DENIED TO PERSONS WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS WHEN THE PUBLIC SERVICE COMMISSION OF THIS STATE APPROVED A TERRITORIAL SERVICE AGREEMENT BETWEEN A PRIVATE UTILITY COMPANY, SUBJECT TO THE COMMISSION'S JURISDICTION, AND A MUNICIPALLY OWNED AND OPERATED POWER PLANT, EXPRESSLY EXEMPTED FROM THE COMMISSION'S JURISDICTION, WHEREBY CUSTOMERS OF THE PRIVATE UTILITY ARE TO BE FORCIBLY TRANSFERRED AS CUSTOMERS, OVER THEIR PROTEST, TO THE MUNICIPALITY, THOUGH THE PERSONS SO TRANSFERRED ARE NOT RESIDENTS OF THAT MUNICIPALITY.

III

WHETHER OR NOT FLORIDA STATUTE 366.11, WHEREIN MUNICIPALLY OWNED AND OPERATED PUBLIC UTILITIES ARE EXPRESSLY EXEMPTED FROM REGULATION UNDER CHAPTER 366, REGULATION

OF PUBLIC UTILITIES, IS UNCONSTITUTIONAL AS DENYING TO UNWILLING, NON-RESIDENT CUSTOMERS OF SUCH UTILITIES EQUAL PROTECTION OF THE LAWS.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provision involved is Chapter 366 of Florida Statutes, 1967 Edition. The specific section involved is Fla.Stat. 366.11, which section may be found in volume 1, at page 1744 of FLORIDA STATUTES, 1967 Edition. Chapter 366 of Florida Statutes, 1967 Edition, is printed as Appendix E. The Constitutional provision involved is the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States, as follows:

> " . . . ; nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners, representing a class of more than 100 individuals, are residents of an unincorporated area of south Dade County, Florida, adjacent to the city of Homestead, a municipal corporation.

For many years—over 20, in the case of petitioner Storey (transcript pg. 87)—petitioners have been purchasing electricity from Florida Power and Light Company (hereinafter called company), a privately owned pub-

lic utility subject to regulation by the Florida Public Service Commission (hereinafter called commission), a state agency. (Chapter 366, Florida Statutes—Appendix E).

By commission order dated December 1, 1967, its Chairman dissenting (Appendix F), a territorial area service agreement between the company and the city of Homestead was approved insofar as the company was concerned. The city of Homestead, under existing law, is exempt from commission jurisdiction. (Florida Statute 366.11, Appendix E).

The agreement transferred petitioners' residential area to Homestead's municipally owned power plant for electric service. The effect, once implemented, is to compel petitioners and others so situated to purchase electricity from the city owned plant, a non-regulated utility.

Homestead's power rates have been considerably higher than the company's in the past, its service inferior. (Transcript pgs. 87, 89, 90, 93, 96, 99). During the city's fiscal year immediately preceding the commission hearing, approximately 28% of its general revenues came from its power plant net profits. (Transcript, pg. 75). Moreover, Homestead's electric rates are set by its elected officials, may be changed at any time by ordinance, and the recommendations of its Superintendent of utilities as to the rate structure have not always been followed (Transcript pages 85-105 incl.).

Review of the Commission order (Appendix F) was followed by Petitioners' Petition to the Commission for Reconsideration, Correction, and Amendment of the order, or, in the alternative, for Rehearing (Appendix G),

all denied. Thereafter followed Petitioners' Petition for Writ of Certiorari to the Supreme Court of Florida (Appendix H).

The constitutional issue of equal protection of law was first raised at the Florida Public Service Commission hearing in Homestead, Florida on November 8, 1967. (Transcript, page 84). Chairman Mayo's dissent touched on this point. (Appendix F, pages 38, 39). The same issue was spelled out in Petitioner's Petition to the Commission for Reconsideration, Correction, etc. (Appendix G, page 42). Again, Petitioners raised the question of the constitutionality of Section 366.11 of the Florida Statutes in their petition to the state Supreme Court for Writ of Certiorari (Appendix H, page 50). They elaborated on this and the equal protection of law issue in their Brief to, and oral argument before, that Court. The Court's majority opinion (see discussion in "Reasons for Granting Writ" below) acknowledged the issue, without conceding its validity. Thereafter, Petitioners' Petition for Rehearing to the Court (Appendix B) dwelt almost exclusively with this question.

REASONS FOR GRANTING WRIT

Petitioners respectfully submit that the Writ sought herein should be granted under the equal protection clause of the 14th Amendment to the United States Constitution.

For many years petitioners have been well served by a privately owned utility company regulated by the Florida Public Service Commission. They have relied fully upon this exercise of the state's police power (Florida statute 366.01, Appendix E), just as they have relied

upon the other protections afforded them by Florida in return for their taxes and other exercises of their responsibilities of citizenship.

Chapter 366 of the Florida Statutes begins by stating as

LEGISLATIVE DECLARATION—

> "The regulation of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose." (366.01) *Fla. Stats*

Then follows a delineation of the regulatory protections guaranteed and enjoyed by Petitioners as customers of a privately owned public utility. All is then qualified by a single sentence reading,

CERTAIN EXEMPTIONS—

> "No provision of this chapter shall apply in any manner to utilities owned and operated by municipalities, whether within or without any municipality . . ." (366.11, Florida Stats.)

Whereupon, petitioners are told that by administrative fiat (approval by the Florida Public Service Commission of the territorial area service agreement) they are to be divested of all that the state of Florida, through Chapter 366 of its statutes, has been giving them.

To Petitioners' contention that in this instance Florida is treating them as less than first class citizens the state Supreme Court majority answered,

> "IN THE INSTANT SITUATION, THESE PETITIONERS HAVE NOT BEEN DENIED EQUAL PROTECTION BECAUSE THEY OCCUPY THE SAME STATUS AS ALL USERS OF THE MUNICIPAL POWER. IN THE EVENT OF EXCESSIVE RATES OR INADEQUATE SERVICE THEIR APPEAL UNDER FLORIDA LAW IS TO THE COURTS OR THE MUNICIPAL COUNCIL." 217 So.2d 304, 308 - Appendix A).

This is tantamount to depriving petitioners of the equal protection of Florida law. Unlike municipal residents who use municipal power, they cannot vote in municipal elections to correct displeasing or discriminatory practices of the power plant. They cannot share in the profits derived through its sale of electricity. They will be forced to buy their electricity from a monopoly source without the regulatory protection previously guaranteed and furnished them by the state.

The Florida Supreme Court majority has advised them their recourse would be to "the courts or the municipal council." Under this reasoning, might petitioners next be told to process their own grievances without the aid of the Florida Industrial Commission if injured while covered under Workmen's Compensation Law? Are they to be protected in the future by the state Insurance Commissioner against improper acts of insurors subject to state regulation? Can petitioners be certain of the services

of an official prosecutor should they become victims of a criminal act?

If petitioners are oppressed by extortionate charges levied or inferior service rendered by Homestead's power plant, are they not wronged as completely as if the act or omission had been committed by a privately owned utility? Should a difference in ownership change the character of the wrong done or justify the refusal by the state of a prompt, adequate, and legally sanctioned remedy available to others like Petitioners at no individual expense other than the taxes all citizens are compelled to pay?

State legislatures and courts have long recognized the distinction between the furnishing by a municipally owned utility of service within and without the municipality's corporate limits. See annotation, 127 ALR 94, "*Power of state or Public Service Commission to regulate, or of court to pass upon reasonableness of, rates of municipally owned or operated public utility.*", and annotations cited therein. Also see 70 ALR2d 1326, "*Validity of contract between public utilities other than carrier, dividing territory and customers*" and annotations cited therein.

Here, petitioners submit, the issue is equal protection of law. The territorial area agreement between Florida Power and Light Company and the city of Homestead is, as to petitioners, discriminatory in that it tends to remove them from regulatory protection. Without state action, i.e., without approval by the Public Service Commission, all parties herein admit that Florida Power and Light Company would not proceed to implement this agreement. The facts, then, fall within those doctrines clearly enunciated

by Chief Justice Vinson in SHELLEY v. KRAEMER, 334 US 1, 68 S.Ct. 836, 92 L.ed. 1161, 3 ALR2d 441 (1948).

Justice Vinson found, in SHELLEY v. KRAEMER, state action where the judicial branch of state government was involved. He held further that in granting judicial enforcement of the restrictive agreements involved there the state of Missouri had denied petitioners the equal protection of law.

Has the Florida legislature made a valid classification in exempting from regulation municipally owned utilities which aggressively seek business outside municipal boundaries? As to petitioners the answer must be negative, since the end result otherwise is to force them to meet their essential needs for electricity from a municipally owned monopoly source not subject to reasonable forms of restraint. A classification fixing the type of ownership (municipal or private) as the sole determinant of whether or not petitioners receive regulatory protection must be held arbitrary, invidious, and discriminatory, and thus violative of the equal protection clause. SHELLEY v. KRAEMER, 334 US 1, 68 S.Ct. 836, 92 L.ed. 1161, 3 ALR 2d 441 (1948); BARBIER v. CONNOLLY, 113 US 27, 5 S.Ct. 357, 28 L.ed 923 (1885); YICK WO v. HOPKINS, 118 US 356, 6 S.Ct. 1064, 30 L.ed 220 (1886); HARTFORD STEAM BOILER CO. v. HARRISON, 301 US 459, 57 S.Ct. 838, 81 L.ed 1223 (1937); MOREY v. DOUD, 354 US 457, 77 S.Ct. 1344, 1 L.ed 2d 1485 (1957); McLAUGHLIN v. FLORIDA, 379 US 184, 85 S.Ct. 283, 13 L.ed 2d 222 (1964); BAXSTROM v. HEROLD, 383 US 107, 86 S.Ct. 760, 15 L.ed 2d 620 (1966); RINALDI v. YEAGER, 384 US 305, 86 S.Ct. 1497, 16 L.ed 2d 577 (1966); LOVING v. VIRGINIA, 388 US 1, 87 S.Ct. 1817, 18 L.ed 2d 1010 (1967); HUNTER v. ERICKSON, ____ US____, 89 S.Ct.____, 21 L.ed 2d 616 (1969).

CONCLUSION

On the basis of the foregoing, petitioners respectfully submit that this Court should issue its Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

IRVING PESKOE
Attorney for Petitioners
1000 N. Krome Avenue
Homestead, Florida 33030

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 9th day of April, 1969, as attorney for Petitioners herein, I mailed one copy each of the foregoing Petition for Writ of Certiorari, and its incorporated Appendices, by first class postage prepaid, except for those noted below as going via air mail prepaid, to all the respective attorneys of record for the interested parties involved herein, as follows:

To: R.M.C. Rose, Esq., Counsel, Florida Public Service Commission, Tallahassee, Florida 32304, Respondents, and H. E. Carraway, Director of Administrative Services, Florida Public Service Commission, Tallahassee, Florida 32304, each via air mail.

To: Philip Goldman, Esq., Scott, McCarthy, Steel, Hector, and Davis, Attorneys for Florida Power and Light Company, First National Bank Building, Miami, Florida.

To: Vernon Turner, Esq., Attorney for City of Homestead, 850 N. Krome Avenue, Homestead, Florida 33030.

IRVING PESKOE
Attorney for Petitioners

APPENDIX A

(TITLE OMITTED)

Rehearing Denied Dec. 12, 1968.

Certiorari proceeding by consumers to review order of Public Service Commission which approved a territorial service agreement between a privately owned electric utility and a municipal electric utility. The Supreme Court, Thornal, J., held that territorial service agreement entered into to avoid overlapping service and expensive competitive activity was not invalid as being in restraint of trade, contrary to public interest, or violative of equal protection.

Petition denied.

Caldwell, C. J., and Ervin, J., dissented.

1. Electricity — 1

Powers of Public Service Commission to regulate privately owned electric utilities are exclusive and, therefore, necessarily broad and comprehensive. F.S.A. §§ 366.03, 366.05.

2. Electricity — 1

Power of Public Service Commission over privately owned electric utilities is omnipotent within confines of statute and limits of organic law. F.S.A. § 366.01 et seq.

3. Public Service Commissions — 6.6

Power to mandate efficient and effective utility in public interest necessitates correlative power to protect utility against unnecessary, expensive competitive practices. F.S.A. § 366.01 et seq.

4. Public Service Commissions — 6.7

Individual has no organic, economic or political right to service by particular utility merely because he deems it advantageous to himself.

5. Constitutional Law — 225(1)

Individuals who protested territorial service agreement between two electric utilities, which was entered into to avoid overlapping service, and which required them to take electrical service from unregulated municipal utility rather than from regulated private utility, from which they had been receiving service, were not denied equal protection, since they occupied same status as all users of power from municipal utility.

6. Electricity — 11(4), 11.3(7)

In event of excessive rates or inadequate service by municipal electric utility that assumed function from privately owned utility of supplying electricity to certain individuals, individuals would have appeal to courts or municipal council.

7. Electricity — 11(2)

Obligation of privately owner electric company was to furnish reasonably sufficient service to applicants therefor upon terms required by Public Service Commission. F.S.A. § 366.03.

8. Electricity — 11(5)

Evidence was sufficient to support conclusion that it was not reasonable to require privately owned electric utility to continue to service area, which was subject of agreement between privately owned utility and municipal utility that municipal utility would take over function of servicing area. F.S.A. § 366.05.

9. Electricity — 11(5)

Notice of hearing before Public Service Commission on application for approval of territorial service agreement between privately owned electric utility and municipal utility was sufficient, where formal notice in adequate detail was published and city notified all of its affected customers by personally delivered letter well in advance of hearing.

10. Constitutional Law — 211

Electricity — 11(5)

Territorial service agreement between privately owned electric utility and municipal electric utility, by which municipal utility would take over function of privately owned utility in suburban area, and which was

entered into to avoid overlapping service and expensive competitive activity was not invalid as being in restraint of trade, contrary to public interest, or violative of equal protection. F.S.A. §§ 350.641, 366.01 et seq., 366.03, 366.05, 366.10, 366.11.

Irving Peskoe, pro se, and for Robert L. Lewis, for petitioners and others directly affected.

Robert M. C. Rose, Tallahassee, for Florida Public Service Commission.

Phillip Goldman of Scott, McCarthy, Steel, Hector & Davis, Miami, for Florida Power & Light Co.

Vernon W. Turner of Turner & Hodson, Homestead, for City of Homestead.

THORNAL, Justice.

By petition for a writ of certiorari we have for review an order of the Florida Public Service Commission which approved a territorial service agreement between two electric utilities, one being privately-owned and regulated by the state, the other being municipally owned and unregulated.

We must decide whether the subject agreement is invalid as being in restraint of trade, contrary to the public interest, or violative of equal protection requirements.

The City of Homestead, a municipal corporation, owns its electric utility system. It serves all residents in

the City and some in adjacent non-municipal areas. Florida Power and Light Company is a privately-owned electric utility. It serves extensive areas along the east coast, lower west coast and south central sections of Florida. Included in the Company's service territory is the non-municipal area surrounding Homestead. Because of the municipal operation the Company is not permitted to serve customers inside the city limits. However, prior to the subject agreement, the Company and the City actively competed for customers in the suburban areas. This, of course, required duplicating paralleling and overlapping distribution systems in the affected areas. This duplication of lines, poles, transformers and other equipment not only marred the appearance of the community but it also increased the hazards of servicing the area. Such overlapping distribution systems substantially increase the cost of service per customer because they simply mean that two separate systems are being supplied and maintained to serve an area when one should be sufficient. Obviously, neither system receives maximum benefit from its capital invested in the area. The ultimate effect of this is that the rates charged in the affected area are necessarily higher, or, alternatively, the customers in some other part of the system must help bear the added cost. It is the latter which most often happens in an extensive system-wide operation, such as that conducted by the Company here.

In order to end the unsatisfactory effects of this type of expensive, competitive activity, the City and the Company, on August 7, 1967, executed the territorial service agreement which is the subject of this litigation. In effect it established areas of service around the City in the suburban territory. It provided that twelve (12)

commercial and sixty-six (66) residential customers would be transferred from the City to the Company. Thirty-five (35) commercial and three hundred sixty-three (363) residential electric customers were transferred to the City by the Company. There were provisions for reciprocal transfers of facilities and a reservation by the City of authority to continue to serve certain municipally-owned property located in the Company service area. On November 1, 1967, the City Council of Homestead adopted a resolution providing that electric utility rates to be charged residential customers in the proposed service area would "be established as those now existing in the proposed service area" and served by the Company. This resolution is a part of the record which also reveals that over a period of forty-three (43) years electric rates charged customers of the city have never been raised.

The Company applied to the Florida Public Service Commission for approval of the agreement. A hearing, pursuant to notice, was held at the Homestead City Hall on November 8, 1967. Witnesses for the City and Company were presented. None of the customers being transferred from City to Company appeared. Seven, including petitioners, appeared in opposition to the transfers by the Company to the City. Petitioners now here claim to represent a class numbering more than one hundred in this category. At the hearing, the City expressly stated that it was not conceding Commission jurisdiction over the municipal operation. By a 2-1 vote the Commission approved the agreement. Petitioners, who were among the protestants, seek review pursuant to Fla.Stat. § 350.641 (1967), F.S.A.; Fla.Stat. § 366.10 (1967), F.S.A.

The petitioners contend that the notice of the hearing was insufficient; that the proposed agreement is contrary to the public interest and is in restraint of trade; and that it denies to them both equal protection and due process of law. They claim that the impact of the agreement is to force them to take service from an unregulated instead of a regulated utility. They insist that the rates and service of the latter are superior to the former, and that the agreement eliminates competition.

[1] The established state policy in Florida is to supervise privately-owned electric utilities through regulation by a state agency. By the same policy municipally-owned electric utilities are expressly exempted from state agency supervision. Fla.Stat. § 366.11 (1967), F.S.A. It was for this reason that in the instant matter, the City pointedly saved itself against submission to Commission jurisdiction. Under Florida law, municipally-owned electric utilities enjoy the privileges of legally protected monopolies within municipal limits. The monopoly is totally effective because the government of the City, which owns the utility, has the power to preclude even the slightest threat of competition within the city limits. On the other hand, the rates are services of the privately-owned electric companies are regulated by the respondent Commission. Fla.Stat. Ch. 366 (1967), F.S.A. Service areas are not specifically controlled by requirement of certificates of public necessity and convenience. However, in some measure the Commission does control the areas served by the companies by virtue of its prescribed powers, including the specific power "* * * to require repairs, improvements, additions and extensions to the plant and equipment of any public utility reasonably necessary to promote the convenience and welfare of the public and secure

adequate service or facilities for those reasonably entitled thereto * * *." Fla.Stat. § 366.05 (1967), F.S.A. The regulatory powers of the Commission, as announced in the cited section, are exclusive and, therefore, necessarily broad and comprehensive. Fla.Stat. § 366.03 (1967), F.S.A.; Florida Power & Light Co. v. City of Miami, 72 So.2d 270 (Fla.1954).

[2, 3] The powers of the Commission over these privately-owned utilities is omnipotent within the confines of the statute and the limits of organic law. Because of this, the power to mandate an efficient and effective utility in the public interest necessitates a correlative power to protect the utility against unnecessary, expensive competitive practices. While in particular locales such practices might appear to benefit a few, the ultimate impact of repetition occurring many times in an extensive system-wide operation could be extremely harmful and expensive to the utility, its stockholders and the great mass of its customers. Tampa Electric Co. v. Withlacoochee River Electric Coop., 122 So.2d 471 (Fla.1960). It was a recognition of this basic concept that led us to approve territorial service agreements between two regulated utilities. Peoples Gas System, Inc., v. Mason, 187 So.2d 335 (Fla.1966); City Gas Co., v. Peoples Gas System, Inc., 182 So.2d 429 (Fla.1965). In the last-cited cases we recognized the importance of the regulatory function as a substitute for unrestrained competition in the public utility field. We there noted that often a regulated or measurably controlled monopoly is in the public interest, and that in the area of public utility operations competition alone has long since ceased to be a potent or even a reasonably efficient regulatory factor.

[4-6] An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself. If he lives within the limits of a city which operates its own system, he can compel service by the city. However, he could not compel service by a privately-owned utility operating just across his city limits line merely because he preferred that service. In the instant situation, these petitioners have not been denied equal protection because they occupy the same status as all users of the municipal power. In the event of excessive rates or inadequate service their appeal under Florida law is to the courts or the municipal council.

[7, 8] The obligation of the respondent electric company is to furnish reasonably sufficient service to applicants therefor "* * * upon terms as required by the commission * * *" Fla.Stat. § 366.03 (1967), F.S.A. When the Commission approved the subject agreement, it, in effect, informed the respondent electric company that it would not have to serve the particular area because under the circumstances it would not be reasonable to require it to do so. Fla.Stat. § 366.05, F.S.A., supra. There was certainly competent, substantial evidence to support this conclusion and the Commission had the power to act in the premises. The petitioners here are in the posture of customers demanding service of a particular regulated utility. The regulatory agency has heard the matter and with evidentiary support has concluded that under the circumstances it would be unreasonable to require this utility to render the service. This in substance is the ultimate impact of the arrangement which the Commission has approved.

[9] Petitioners' attack on the notice of the hearing is without merit. A formal notice in adequate detail was published. In addition the City notified all of its affected customers by a personally delivered letter well in advance of the hearing.

[10] The arrangement under review was reached after several years of negotiations between the City and the Company. It received the unanimous approval of the City Council. Following a well-publicized hearing it has been approved by a majority of the respondent Commission which is burdened with the duty of measuring its judgment by the dictates of the public convenience and welfare in this type of situation. When we measure the obligations of the respondent electric company by the responsibilities placed upon it under Fla.Stat. Ch. 366 (1967), F.S.A., and especially in view of the extensive regulatory powers of the respondent Commission, we see no reason to disturb the subject order.

The petition for certiorari is denied.

It is so ordered.

THOMAS, ROBERTS, DREW and ADAMS (Ret.), JJ., concur.

CALDWELL, C. J., dissents.

ERVIN, J., dissents with Opinion.

ERVIN, Justice (dissenting).

Once again we have a case where the Florida Public Service Commission has approved a territorial agreement between two utilities over the objections of a large number of consumers of one of the utilities. See earlier cases: City Gas Co. v. Peoples Gas System, Inc., Fla. 182 So.2d 429, and Peoples Gas System, Inc., v. Mason, Fla., 187 So.2d 335. One is an electric utility municipally operated; the other is a private electric power company under the regulation of the Public Service Commission. Despite the fact that the Legislature has never given the Public Service Commission the express power to approve such agreements (and certainly not the power to approve agreements where one of the utilities is municipally operated, over which the Commission has no regulatory jurisdiction), nevertheless the objecting customers who have been served by the private company, some for many years, now have been "transferred" by the agreement from the status of customers of the private electric power company to the status of new customers of the City.

I note conclusions in the majority opinion that the purpose of the territorial agreement is to curtail "duplicating, paralleling and overlapping distributions systems in the affected areas"; that this "overlapping" marred the appearance of the community and substantially increased the cost of service per customer "because they simply mean that two separate systems are being supplied and maintained to serve an area when one should be sufficient." The objecting customers give not the slightest indication they are dissatisfied with the cost of service to them. On the contrary, they allege they are content and wish to remain paying customers of the private utility. From my reading of the record I find no substantial support for these conclusions or that any comprehensive hearing was afforded Petitioners to voice their objections.

On the basis of this record, I conclude the convenience of the two utilities—primarily the interest of the municipal electric utility—was the paramount objective served by the agreement, rather than the interest of the consumers. I get the impresison from the record the private electric company yielded to the demands of the municipality to surrender the subject suburban territory in order to "keep peace" with the City, since there had been wrangling between the two utilities concerning which should provide utility service in the subject area for a number of years. I do not subscribe to the view that long standing consumers of a particular electric company have no substantial interest in the status quo of their existing service, but may be required by the private utility, with the approval of the Commission, to thereafter obtain electric power from the City. Especially is this so where there is no showing the private company will suffer economic loss by continuing to serve such consumers, but is complacently agreeable for public relations or policy considerations to yield these consumers to the City.

In 43 Am.Jur. Public Utilities and Services, § 78, the text at page 621 reads in part:

"* * * An electric company may not cease to serve the public because the city, in constructing a competing system, has created conditions rendering continued service dangerous and refuses to alter them. [Citing Alabama Power Co. v. City of Guntersville, 236 Ala. 503, 183 So. 396, 119 A.L.R. 429.] Where a public service company does not show that a branch of service which it wishes to discontinue results in a loss, permission to discontinue will generally be refused. * * *" [Citing 21 A.L.R. 578.]

In conclusion, it appears to me that customers who have long been served by a private power company have a substantial property right to continue receiving electric current from that company; that whatever competition exists between utility companies should not be looked upon with disfavor but should be eliminated only in extreme circumstances where it is apparent the economic interests of the utilities, or one of them, are being jeopardized by such competition to the disadvantage of the consuming public; that unless the Legislature specifically grants authority to the Public Service Commission to approve divisions of service territory between utility companies and "transfer customers" therein, such authority should not be implied by the Commission, and especially should this be so where the Commission has no regulatory jurisdiction supervising the supplying of power by municipal utilities.

I believe the majority decision will come as a surprise to electricity consumers who reside within suburban areas outside cities and have long been served by a private utility company that there is a possibility that at some time in the future they may be "transferred" as customers from the private electric company and become customers of the adjacent city electric utility.

APPENDIX B

(TITLE OMITTED)

PETITION FOR REHEARING

Mrs. JOHN DE RAISMES STOREY, el al, Petitioners in the above styled cause, by their undersigned attorneys, respectfully Petition this Court to set aside and withdraw its decision and opinion filed November 6, 1968 denying Petitioners' Petition for a Writ of Certiorari to review an order of the Florida Public Service Commission approving a territorial service agreement, and to rehear this cause on the following grounds:

Petitioners respectfully submit that the above cited decision is not in accord with the essential requirements of law and it denies Petitioners the equal protection of law. In furtherance of this contention, Petitioners would show that:

1. The majority opinion states that (middle page 5) "In the instant situation, these petitioners have not been denied equal protection because they occupy the same status as all users of the municipal power. In the event of excessive rates or inadequate service their appeal under Florida law is to the courts or to the municipal council."

Petitioners do not occupy the same status as residents of the municipality, also users of the municipal power. Petitioners do not own the municipal power plant. The

municipal residents do. Petitioners cannot vote to select those who will operate the plant. Municipal residents can. Petitioners have no effective voice in the operation of the municipal plant, as do the municipal residents. Finally, the Petitioners do not share in the sizable profits derived from the operation of the plant. Municipal residents can and do.

Surely, it was never the intention of the Florida Legislature to force Petitioners and other members of the public to forego the protection guaranteed them by the law which set up the Florida Public Service Commission and its powers. The majority of this Court says Petitioners may appeal, when wronged, ". . . to the courts or municipal council." Petitioners *are* appealing to *this* Court and ask only that statutorily declared protection of the Florida Public Service Commission not be denied them now or in the future.

2. Florida Statute 366.01 reads: "Legislative Declaration.

> — The regulation of public utilities as defined herein is declared to be in the *public interest* and this chapter shall be deemed to be an exercise of the police power of the state for the *protection of the public welfare* and all the provisions hereof shall be *liberally construed* for the accomplishment of that purpose." (*underlining* furnished for emphasis)

The Commission found, by a 2-1 majority (Chairman Mayo dissenting) that it was not reasonable to require Florida Power and Light to continue serving the area

within which the Petitioners live. At no time did the Commission majority squarely face the legislative command that it exercise its power liberally to protect the Petitioners and others so situated, against potential future abuses. The Commission, in essence, has deserted the Petitioners, removing its jurisdictional blanket from the area in question. A void is left.

The Public Service Commission members are charged by law with protecting the public; Homestead's elected representatives, who run its municipal power plant, are representative and responsible only to that segment of the public residing within Homestead's municipal boundaries. Two distinct classes are involved and Petitioners are that segment of the public who will suffer because of their exclusion from both classes.

It is axiomatic that this Court construes statutes to be constitutional whenever possible. The Homestead municipal power plant is exempted from regulation by the Florida Public Service Commission under Florida Statute 366.11. Petitioners submit that such an exemption is constitutional only on the rationale that municipal residents require no protection from themselves, and contend that the Public Service Commission is charged with the duty of protecting those members of the public who must obtain their essential utilities from companies they do not own, i.e. from privately owned utility companies. The removal of Petitioners from the Florida Public Service Commission regulatory protection, over their protest, renders Florida Statute 366.11 unconstitutional.

Petitioners submit that the State of Florida, through the Public Service Commission's ruling approving the

agreement under review herein, has denied to Petitioners the equal protection of law, as guaranteed under the Fourteenth Amendment of the United States Constitution and the equal rights provisions of the Constitution of the State of Florida.

Petitioners therefore petition and pray this Court to reconsider this cause, withdraw its opinion and reconsider this case and to reverse the order of the Public Service Commission at issue.

Dated at Homestead, Dade County, Florida, on this 19th day of November, 1968.

Signed

IRVING PESKOE, for him and for ROBERT L. LEWIS, Attorneys for the named Petitioners and others directly affected,
1000 N. Krome Avenue
Homestead, Florida 33030
Phone 247-1435

I HEREBY CERTIFY that a true copy of the above and foregoing Petition for Rehearing was served upon the following parties and others interested in this cause, by first class mail, on this 19th day of November, 1968, The Florida Public Service Commission marked for the attention of B. Kenneth Gatlin, Esq., Chief Rate Counsel, and R. M. C. Rose, Esq., Staff Counsel, Tallahassee, Florida, to Phillip Goldman, Scott, McCarthy, Steel, Hector & Davis, attorneys for Applicant Florida Power and Light Company, First National Bank Building, Miami, Florida; and Vernon Turner, Esq., City Attorney, City of Homestead, 830 N. Krome Avenue, Homestead, Florida.

Signed

IRVING PESKOE

APPENDIX C

(TITLE OMITTED)

On consideration of the Petition for Rehearing filed by Attorneys for Petitioners,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,

TEST:
SID J. WHITE
Clerk Supreme Court

APPENDIX D

(TITLE OMITTED)

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 11th, 1969.

S/ HUGO L. BLACK
Associate Justice of the Supreme Court of the United States

Dated this 6th day of March, 1969.

APPENDIX E

CHAPTER 366

REGULATION OF PUBLIC UTILITIES

366.01 Legislative declaration.
366.02 Public utility defined.
366.03 General duties of public utility.
366.04 Florida public service commsission; jurisdiction.
366.041 Rate fixing; adequacy of facilities as criterion.
366.05 Powers.
366.06 Rates; procedure for fixing and changing.
366.07 Rates; adjustment.
366.08 Investigations, inspections; power of commission.
366.09 Incrimination at hearing of commission.
366.10 Review of commission's orders.
366.11 Certain exemptions.
366.12 Penalty.
366.13 Taxes; not affected.

366.01 Legislative declaration.—The regulation of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose.

History.—§1, ch. 26545, 1951.

366.02 Public utility defined.—The term public utility as used herein means and includes every person, corporation, partnership, association or other legal entity and their lessees, trustees or receivers, now or hereafter either

owning, operating, managing or controlling any plant or other facility supplying electricity or gas (natural, manufactured or similar gaseous substance) to or for the public within this state, directly or indirectly for compensation; but the term "public utility" as used herein does not include either a cooperative now or hereafter organized and existing under the rural electrification cooperative law of the state nor a municipality nor any natural gas pipe line transmission company making only sales of natural gas at wholesale and to direct industrial consumers, nor a person supplying liquefied petroleum gas, in either liquid or gaseous form, irrespective of the method of distribution or delivery, unless such person also supplies electricity, manufactured or natural gas.

History.—§2, ch. 26545, 1951.

366.03 General duties of public utility.—Each public utility shall furnish to each person applying therefor reasonably sufficient, adequate and efficient service upon terms as required by the commission, provided, no public utility shall be required to furnish electricity or gas for resale. All rates and charges made, demanded or received by any public utility for any service rendered, or to be rendered by it, and each rule and regulation of such public utility, shall be fair and reasonable. No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect.

History.—§3, ch. 26545, 1951.

366.04 Florida public service commission; jurisdiction.—In addition to its existing functions, the Florida public service commission shall have jurisdiction to regu-

late and supervise each public utility with respect to its rates, service and the issuance and sale of its securities except a security which is a note or draft maturing not more than one year after the date of such issuance and sale, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is liable) not more than five per cent of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this section shall be the fair market value as of the date of issue. The jurisdiction conferred upon said commission shall be exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and in case of conflict therewith all lawful acts, orders, rules and regulations of the commission shall in each instance prevail.

History.—§4, ch. 26545, 1951; §1, ch. 63-288; §1, ch. 63-279; §1, ch. 65-52.

366.041 Rate fixing; adequacy of facilities as criterion.—

(1) In fixing the just, reasonable, and compensatory rates, charges, fares, tolls, or rentals to be observed and charged for service within the state by any and all public utilities under its jurisdiction, the Florida Public Service Commission is authorized to give consideration, among other things, to the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered, the value of such service to the public, and the ability of the utility to improve such service and facilities; provided that no public utility shall be denied a reasonable rate of return upon its rate base in any order entered pursuant

to such proceedings. In its consideration thereof, the commission shall have authority, and it shall be the commission's duty, to hear service complaints, if any, that may be presented by subscribers and the public during any proceedings involving such rates, charges, fares, tolls, or rentals; provided however, that no service complaints shall be taken up or considered by the commission at any proceedings involving rates, charges, fares, tolls or rentals unless the utility shall have been given at least thirty days written notice thereof and any proceeding may be extended prior to final determination for such period; and provided further that no order hereunder shall be made effective until a reasonable time shall be given the utility involved to correct the cause of service complaints considering the factor of growth in the community and availability of necessary equipment.

(2) The power and authority herein conferred upon the Florida Public Service Commission shall not cancel or amend any existing punitive powers of the commission but shall be supplementary thereto and shall be construed liberally to further the legislative intent that adequate service shall be rendered by public utilities in the state in consideration for the rates, charges, fares, tolls, and rentals fixed by said commission and observed by said utilities under its jurisdiction.

(3) The term "public utility" as used herein means all persons or corporations which the Public Service Commission has the authority, power, and duty to regulate for the purpose of fixing rates and charges for services rendered and requiring the rendition of adequate service.

(4) Any order entered pursuant to the provisions of this section shall contain specific finding of law and fact upon which it is based and shall be fully reviewable by the supreme court as provided by law.

History.—§§1-4, ch. 67-326.

366.05 Powers.—

(1) In the exercise of such jurisdiction, the commission shall have power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility; to prescribe uniform system and classification of accounts for all public utilities, which among other things shall set up adequate, fair and reasonable depreciation rates and charges; to require the filing by each public utility of periodic reports and all other reasonably necessary data; to require repairs, improvements, additions and extensions to the plant and equipment of any public utility reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto; to employ and fix the compensation for such examiners, and technical, legal and clerical employees as it deems necessary to carry out the provisions of this chapter; to prescribe all rules and regulations reasonably necessary and appropriate for the administration and enforcement of this chapter; and to exercise all judicial powers, issue all writs and do all things, necessary or convenient to the full and complete exercise of its jurisdiction and the enforcement of its orders and requirements.

(2) Every public utility as defined in §366.02, who in addition to the production, transmission, delivery or furnishing of heat, light or power also sells appliances or other merchandise, shall keep separate and individual accounts for the sale and profit deriving from such sales. No profit or loss shall be taken into consideration by the commission from the sale of such items in arriving at any rate to be charged for service by any public utility.

(3) The commission shall provide for the examination and testing of all appliances used for measuring any product or service of a public utility.

(4) Any consumer or user may have any such appliance tested upon payment of the fees fixed by the commission.

(5) The commission shall establish reasonable fees to be paid for testing such appliances on the request of the consumers or users, the fee to be paid by the consumer or user at the time of his request, but to be paid by the public utility and repaid to the consumer or user if the appliance be found defective or incorrect to the disadvantage of the consumer or user, in excess of the degree or amount of tolerance customarily allowed for such appliances, or as may be provided for in rules and regulations of the commission.

(6) The commission may purchase materials, apparatus, and standard measuring instruments for such examination and tests.

History.—15, ch. 26545, 1951.

366.06 Rates; procedure for fixing and changing.—

(1) All rates being charged and collected by a public utility on May 9, 1951, shall be the lawful rates until changed in accordance with the rules, regulations or orders of the commission or court decree. Under rules and regulations to be prescribed by the commission every public utility shall, within ninety days after the effective date of such rules and regulations, file with the commission schedules showing all rates, classifications and charges for service of every kind furnished by it, and all rules and regulations relating thereto in effect on May 9, 1951. Thereafter current schedules shall be maintained on file with the commission on such forms and under such rules and regulations as the commission may prescribe.

(2) A public utility shall not, directly or indirectly, charge or receive any rate not on file with the commission for the particular class of service involved, and no change shall be made in any schedule. All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just and reasonable rates that may be requested, demanded charged or collected by any public utility for its service. The commission shall investigate and determine the actual ligitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for rate-making purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, less accrued de-

preciation, and shall not include any good-will or going-concern value or franchise value in excess of payment made therefor.

(3) Whenever the commission shall find, upon request made or upon its own motion, that the rates demanded, charged or collected by any public utility company for public utility service, or that the rules, regulations or practices of any public utility company affecting such rates are unjust, unreasonable, unjustly discriminatory, or in any wise in violation of law, or that such rates are insufficient to yield reasonable compensation for the services rendered, or that such service is inadequate or cannot be obtained, the commission shall order and hold a public hearing, giving notice to the public and to the utility company, and shall thereafter determine just and reasonable rates to be thereafter charged for such service and to promulgate rules and regulations affecting equipment, facilities and service to be thereafter installed, furnished, and used; provided, however, that nothing in this chapter shall be construed to affect a rate in litigation and refund proceedings thereunder pending in the courts on April 3, 1951; provided, however, that a rate order of a duly constituted local regulatory board or authority entered before April 3, 1951 shall be deemed to be the lawful rates charged and collected by the public utility subject to such regulatory body, and should such rate order be challenged and/or such challenge is pending before the courts of this state or the United States, such rate order shall continue in full force and effect until final determination of such litigation, or until changed by an order of the commission, and the jurisdiction of said board to continue said litigation, and said rates, shall continue until such final determination by the courts, and the

commission shall not interfere with the conduct of such litigation nor the jurisdiction of the board.

History.—§6, ch. 26545, 1951.

366.07 Rates; adjustment. — Whenever the commission, after public hearing either upon its own motion or upon complaint, shall find the rates, rentals, charges or classifications, or any of them, proposed, demanded, observed, charged or collected by any public utility for any service, or in connection therewith, or the rules, regulations, measurements, practices or contracts, or any of them, relating thereto, are unjust, unreasonable, insufficient, or unjustly discriminatory or preferential, or in any wise in violation of law, or any service is inadequate or cannot be obtained, the commission shall determine and by order fix the fair and reasonable rates, rentals, charges or classifications, and reasonable rules, regulations, measurements, practices, contracts or service, to be imposed, observed, furnished or followed in the future.

History.—§7, ch. 26545, 1951; §24, ch. 57-1.

366.08 Investigations, inspections; power of commission.—The commission or its duly authorized representatives may during all reasonable hours enter upon any premises occupied by any public utility and may set up and use thereon all necessary apparatus and appliances for the purpose of making investigations, inspections, examinations and tests and exercising any power conferred by this chapter; provided, such public utility shall have the right to be notified of and be represented at the making of such investigations, inspections, examinations and tests.

History.—§8, ch. 26545, 1951.

366.09 Incrimination at hearing of commission.— Any person called upon to testify before the commission or one of its examiners shall not be excused from answering on the ground or claim that his testimony would tend to incriminate himself; but no person having so testified shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may have testified or produced documentary evidence provided that no person so testifying shall be exempted from prosecution or punishment for perjury in so testifying.

History.—§9, ch. 26545, 1951.

366.10 Review of commission's orders. — Any public utility or any person in interest dissatisfied with any order of the commission may have it reviewed by the supreme court by certiorari.

History.—§10, ch. 26545, 1951.

366.11 Certain exemptions.—No provision of this chapter shall apply in any manner to utilities owned and operated by municipalities, whether within or without any municipality, or by cooperatives organized and existing under the rural electrification cooperative law of the state, nor to the sale of electricity, manufactured gas or natural gas at wholesale by any public utility to, and the purchase by, any municipality or cooperative under and pursuant to any contracts now in effect or which may be entered into in the future, where such municipality or cooperative is engaged in the sale and distribution of electricity, manufactured or natural gas, nor to the rates provided for in such contracts. Nothing herein shall restrict the police power of municipalities over their streets, highways and public places or the power to maintain or require the

maintenance thereof, nor the right of a municipality to levy taxes on public services under §167.431, nor affect the right of any municipality to [redacted] to receive revenue from any public utility as is [redacted] provided or as may be hereafter provided in any franchise, nor repeal §167.22.

History.—§11, ch. 26545, 1951.

366.12 Penalty.—If any public utility, by any authorized officer, agent or employee, shall knowingly refuse to comply with or wilfully violate any provision of this chapter or any lawful rate, rule or regulation, order, direction, demand or requirement prescribed by the commission hereunder, such public utility shall incur a penalty for each such offense of not more than five thousand dollars to be fixed, imposed and collected by the commission. Each day that said refusal or violation continues shall constitute a separate offense. Each penalty shall be a lien upon the real and personal property of the public utility, enforceable by the commission as statutory liens under chapter 85, the proceeds of which shall be deposited to the credit of the general revenue fund of the state.

History.—§12, ch. 26545, 1951.

366.13 Taxes; not affected.—No provision of this chapter shall in any way affect any municipal tax or franchise tax in any manner whatsoever.

History.—§13A, ch. 26545, 1951.

APPENDIX F

(TITLE OMITTED)

DOCKET NO. 9056-EU

ORDER NO. 4285

The following Commissioners participated in the disposition of this matter:

WILLIAM T. MAYO, Chairman

JERRY W. CARTER

EDWIN L. MASON

Pursuant to due notice, the Florida Public Service Commission held a public hearing in the City Council Chamber, City Hall, Homestead, Florida, commencing at 10:00 A.M., on Wednesday, November 8, 1967.

APPEARANCES:

Phillip Goldman, Scott, McCarthy, Steel, Hector & Davis, First National Bank Building, Miami, Florida, for the applicant.
Vernon Turner, City Attorney, City of Homestead, 830 North Krome Avenue, Homestead, Florida, for the City of Homestead.
Irving Peskoe, 1000 North Krome Avenue, Homestead, Florida, a protestant.
B. Kenneth Gatlin, Chief Rate Counsel, Florida Public Service Commission, for the Commission's Staff and the public generally.

The entire record herein, including the exhibits and testimony adduced at the public hearing, have all been examined by the full Commission. After due consideration the Commission now enters its order in this cause.

ORDER

BY THE COMMISSION:

By application in this docket Florida Power and Light Company seeks approval of a territorial agreement between it and the City of Homestead involving territory in Dade County, Florida. The applicant, with its principal offices at 4200 West Flagler Street, Miami, Florida, is an electric utility subject to the jurisdiction of this Commission pursuant to Chapter 366, Florida Statutes. It furnishes electricity and power to customers in those areas of Florida comprising most of the east coast, with the exception of the Jacksonville area and 5 other municipalities where municipal electric systems are in operation. It also serves the area around southern and eastern Lake Okeechobee, the lower west coast area, and portions of central and north-central Florida. It furnishes electricity to customers in approximately 559 communities and in unincorporated areas in the territory described. The City of Homestead is an incorporated city with its corporate limits located in Dade County, Florida. It furnishes electricity and power to customers located in Dade County, Florida, pursuant to the provisions of Chapter 172, Florida Statutes. The City of Homestead is exempted from regulation by this Commission under the provisions of Section 366.11, Florida Statutes.

Involved in the application is a transfer of approximately 12 commercial accounts and 66 residential accounts from the City to Florida Power and Light Company and about 363 residential accounts from Florida Power and Light Company to the City of Homestead. Testimony adduced before the Commission indicated that there are presently duplicate electrical facilities maintained by the Company and by the municipality in certain areas in Dade County where the facilities of the two utility systems are contiguous or coincide. In view of the anticipated growth of the areas embraced in the proposed territorial agreement, further duplication of service is to be anticipated unless separate service areas are agreed to by the two utility systems. Further, the overlapping of these service areas naturally creates wasteful expenditures on the part of each of the utility systems in installing and maintaining duplicate transmission and distribution lines. The elimination of duplicate line would enhance the appearance of the involved areas. Duplicate lines result in an unnecessary hazard to the safety of employees of the utility systems and to the general public, since the lines of one utility necessarily cross the lines of the other at certain points. Further, the witnesses for the two utility systems agreed that by eliminating the necessity for duplicate service in the affected areas, each utility would be enabled to develop and plan its respective future growth in a more orderly manner in order to adequately provide for the service needs of the rapidly growing area of Dade County. In short, the parties to the proposed territorial agreement concur that it will result in the provision of high quality electric service to all of the customers on both systems.

It should be noted at the outset that this agreement is not self-excuting and will not be operative unless approved by this Commission. There has been no transfer of any of the facilities owned by either utility nor have any customers been transferred. However, both the private utility and the municipality have contacted the customers who will be affected by the proposed transfer, explained the nature and effect of the proposed territorial agreement, outlined the types of service provided by each of the utilities and the rate schedules of each, and sought to explain to the customers exactly how this transfer will affect them.

Although the Commission has no jurisdiction over the municipality, it does have the power and authority to examine a territorial agreement to which a regulated public utility is a party. See *City Gas Company v. Peoples Gas System, Inc.*, 182 So.2d 429 (Fla. 1965). This Commission has recognized the wisdom of territorial agreements between competing utilities on several occasions. We have adhered to the general opinion that territorial agreements, when properly presented to the Commission in the proper circumstances, are advisable and indeed in the public interest. As stated in our Order No. 2948 in Docket No. 6081-EU:

> "It is our opinion that territorial agreements which will minimize, and perhaps even eliminate, unnecessary and uneconomical duplication of plant and facilities which invariably accompany expansions into areas already served by a competing utility, are definitely in the public interest and should be encouraged and approved by an agency such as this, which is charged with the duty of regulating utilities in the public interest.

> Duplication of public utility facilities is an economic waste and results in higher rates which the public must pay for essential services. Reasonable and realistic regulation, in such cases, is better than, and takes the place of competition. A public utility is entitled under the law to earn a reasonable return on its investment. If two similar utilities enter the same territory and compete for the limited business of the area, each will have fewer customers, but there will inevitably be excess facilities which must earn a reasonable return. The rates in such a situation will be higher than the service is worth, or customers in more remote areas will bear some of the unjustified expense necessary to support such economic waste. In the absence of a specific statute limiting the service areas of various public utilities, territorial agreements such as we are concerned with here, constitute no unreasonable restriction on the Commission's powers, but actually assist the Commission in the performance of its primary function of procuring for the public essential utility services at reasonable costs."

The proposed territorial agreement represents the culmination of some three years of negotiations between Florida Power and Light Company and the City of Homestead. Testimony before the Commission indicated that no customer being transferred between these two utility systems would pay more for his electrical service than prior to the transfer. Each utility testified that it could offer service to its new customers which would be equally as good, or better, than the service which these customers received before the transfer. It appeared to the Commis-

sion that the types of service offered by each system were quite similar. The Commission concludes that the customers who are affected by the proposed transfer will be in no way adversely affected by approval of the territorial agreement.

Because of the elimination of the unnecessary and uneconomical duplication of facilities which presently exists, and which can be expected to increase in the future, the long-range benefits to these customers and all members of the public should be substantial. This Commission expects that the approval of this agreement will enable each of the utility systems to better serve its customers.

In summary, this Commission finds that the evidence presented shows a clear justification and need for the territorial agreement for which approval is sought. The approval of this agreement should better enable these utilities to provide the best possible utility services to the general public at a very reasonable price. Therefore, in consideration thereof, it is

ORDERED by the Florida Public Service Commission that the application of Florida Power and Light Company for approval of a territorial agreement and establishment of boundaries between that company and the City of Homestead be and the same is hereby granted and that the said territorial agreement be and the same is hereby approved.

By Order of Chairman WILLIAM T. MAYO, Commissioner JERRY W. CARTER and Commission EDWIN

L. MASON, as and constituting the Florida Public Service Commission, this 1st day of December, 1967.

H. E. CARRAWAY
DIRECTOR OF
ADMINISTRATIVE SERVICES

(SEAL)

Chairman Mayo dissenting:

The applicant, Florida Power and Light Company, relies on Commission Order No. 2595, dated March 28, 1958, Docket No. 5256-EU, which approved a territorial agreement between Florida Power Corporation and the Orlando Utility Commission. In that proceeding, although there was some swapping of customers and facilities, only one protestant appeared at the hearing and he offered no testimony.

The applicant further relies on the language used by the Commission in Order No. 2948, Docket No. 6081-EU, entered July 5, 1966, by which a territorial agreement between Florida Power Corporation and Tampa Electric Company was approved. The philosophy followed by the Commission in that proceeding and in similar proceedings since then was that "duplication of public utility facilities is an economic waste and results in higher rates which the public must pay for essential services. Reasonable and realistic regulation in both cases is better than and takes the place of competition." Unlike that case, this docket involves a utility under the jurisdiction of the Commission and a municipally owned and operated utility which is without the jurisdiction of this Commission. In the former

case there would be regulation in the place of competition. That is not entirely so in this case. One of the parties will be regulated, the other will not and the effect of the Commission's approval will do away with the competition between the two parties so that we will have neither competition or regulation. Additionally, the customers of Homestead beyond the corporate limits of the city have no voice at all as to the policies and rates charged them by the city because they are not eligible to vote in city elections. Presently, those customers that are to be transferred to Homestead are being served by the applicant and have recourse to this Commission. The testimony of the seven (7) public witnesses who appeared were all in opposition to the Commission's approval of this agreement. The testimony indicates a dissatisfaction with the service being rendered, or to be rendered, by the City of Homestead and a complete satisfaction of the service being rendered and the rates being charged by Florida Power and Light. The witnesses do not feel assured about the level of rates that will be charged by the City of Homestead, even in view of the resolution passed by the city to freeze the rates at the present level.

The testimony of the company is very general as to how it will aid in serving the public interest. The witness testified that it will help promote public safety, avoid congestion of facilities, further the maintenance of a high quality of service and enable each party to avoid bad customer relations caused by unrestrained competition. Other than the witness' opinion that those conclusions are true, no evidence or exhibits were introduced to show in detail what problems, if any, that this agreement and its approval by the Commission would solve, as was done in the Florida Power Corporation-Orlando Public Utility case. For these reasons I must dissent from the majority view herein.

APPENDIX G

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 9056-EU

IN RE: APPLICATION OF FLORIDA POWER & LIGHT COMPANY FOR APPROVAL OF AN AGREEMENT WITH THE CITY OF HOMESTEAD, FLORIDA, RELATIVE TO SERVICE AREAS.

PETITION FOR RECONSIDERATION, CORRECTION, AND AMENDMENT OF ORDER NO. 4285, OR, IN THE ALTERNATIVE, FOR REHEARING.

TO THE HONORABLE CHAIRMAN WILLIAM T. MAYO, COMMISSIONER EDWIN L. MASON, AND COMMISSIONER JERRY W. CARTER, AS AND CONSTITUTING THE FLORIDA PUBLIC SERVICE COMMISSION:

The Petitioners, Mr. John de Raismes Storey, Mr. and Mrs. Richard Conley, Dr. and Mrs. P. M. Boyd, Jr., Mr. and Mrs. George M. Henriquez, Mr. and Mrs. George Fichter, and Mrs. Francis B. Lincoln, for themselves and in behalf of more than one hundred other persons directly affected with them (and other individuals daily indicating their intention to join herein), respectfully petition the Florida Public Service Commission to reconsider, correct and amend its Order No. 4285 dated the 1st day of December, 1967, service of which was made upon the undersigned on December 4, 1967, and would show that:

I

The issues and questions involved herein are of common and general interest and concern to all of the owners and tenants of property in that territory which is the subject of the Agreement between Applicant Florida Power & Light Company and the City of Homestead, Florida. It is impracticable to list them all herein as individual petitioners, but a list of those wishing to testify in opposition to said Agreement will be furnished in due course. *Many will state under oath that they were never contacted in any way by either Applicant Florida Power & Light Company or the City of Homestead concerning the Agreement itself or the Public Hearing in the City Council Chamber, City Hall, Homestead, Florida, on Wednesday, November* 8, 1967.

II

Potential objectors involved herein were not given proper notice of the cited Hearing.

III

The Order was based on insufficient evidence and on a failure of all the Members of the Commission (the Honorable Jerry W. Carter having been absent from the Hearing) to consider the transcript of the proceedings.

IV

The Order, as rendered, is arbitrary and materially injurious to the legal rights and privileges of Petitioners and others so situated, and failed to give appropriate consideration to matters affecting such right and privileges.

V

The Order deprives Petitioners and others directly affected, of due process and the equal protection of law.

VI

The Order deprives Petitioners and others so situated of their constitutional and statutory rights and is contrary to law.

VII

Petitioners, and others directly affected, wish to present evidence before the entire Commission (Commissioner Jerry W. Carter having been absent from the said Public Hearing) as to the basis for their conviction that the rates charged by the City of Homestead will continue to remain higher than those charged by the Florida Power & Light Company.

VIII

Petitioners, and others directly affected, wish to present evidence before the entire Commission (Commissioner Jerry W. Carter having been absent from the said Public Hearing) as to the basis for their conviction that the service furnished by the City of Homestead has been inferior to, and will continue to remain inferior to that furnished by the Florida Power & Light Company.

WHEREFORE, Petitioners, for themselves and others directly affected, pray this Honorable Commission to forthwith supersede its stated Order No. 4285 dated

December 1, 1967, and to make it of no force and effect and to deny its Applicant Florida Power & Light Company approval of that certain territorial Agreement involved herein between it and the City of Homestead. In the alternative, Petitioners and others directly affected, pray for a rehearing herein, after due notice has been furnished to all customers and potential objectors in the affected service area, before the entire Florida Public Service Commission, in or near the City of Homestead, Dade County, Florida, again after supersedeas notice has been furnished to all parties concerned herein.

Dated at Homestead, Dade County, Florida, on this 18th day of December, 1967.

Signed

IRVING PESKOE, for him and for ROBERT L. LEWIS, Attorneys the named Petitioners and the others directly affected.
1000 N. Krome Avenue
Homestead, Florida 33030

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

IRVING PESKOE, being duly sworn, deposes and says that he is a licensed attorney at law and serving, along with ROBERT L. LEWIS, as attorneys herein for the Petitioners and certain others directly affected; that he has read the foregoing Petition for Reconsideration, Correction, and Amendment of Order No. 4285, or, In the

Alternative, for Rehearing, and knows the contents thereof; that the matters stated therein are true to his knowledge, except such matters as are stated to be upon information and belief, and as to those matters, he believes them to be true.

Signed

IRVING PESKOE

Sworn to before me at Homestead, Dade County, Florida, on this 18th day of December, 1967.

Signed

Notary Public,
State of Florida at Large.
My Commission expires:

CERTIFICATE OF SERVICE

I hereby certify that I have on this 18th day of December, 1967 mailed a copy of the above and foregoing Petition to the following: Phillip Goldman, Esq., Scott, McCarthy, Steel, Hector & Davis, Attorneys for Applicant Florida Power & Light Company, First National Bank Building, Miami, Florida; Vernon Turner, Esq., City Attorney, City of Homestead, 830 N. Krome Avenue, Homestead, Florida 33030; and B. Kenneth Gatlin, Chief Rate Counsel, Florida Public Service Commission, for the Commission's Staff and the Public generally, Tallahassee, Florida. In addition, courtesy copies of the foregoing have been mailed on this date to the individual Commissioners, to-wit: Honorable William T. Mayo, Chairman, Honorable Jerry W. Carter, and Honorable Edwin L. Mason, all care of the Florida Public Service Commission, Tallahassee, Florida.

Signed

IRVING PESKOE

APPENDIX H

(TITLE OMITTED)

CASE NO. 37,203

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA PUBLIC SERVICE COMMISSION

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

The Petitioners, MRS. JOHN DE RAISMES STORY, MR. AND MRS. RICHARD CONLEY, MR. AND MRS. GEORGE FICHTER, DR. P. M. BOYD, JR., et ux et al, for themselves and in behalf of more than one hundred other persons directly affected with them, present this their Petition for Writ of Certiorari, and state that:

PREFACE

1. Petitioners seek to have reviewed that certain Order of the Florida Public Service Commission, Order #4285, Docket #9056-EU, dated December 1, 1967, and its Order #4308, Docket #9056-EU, dated January 19, 1968, which denied reconsideration of the former Order or, in the alternative, a rehearing therein (Chairman Mayo dissenting in each case).

INTEREST OF PETITIONERS

2. Petitioners herein are all directly affected by the cited Orders, each of them being within the territorial area which is being transferred from Florida Power &

Light Company to City of Homestead electric service. None of the Petitioners lives within the boundaries of the City of Homestead.

LEGAL BASIS FOR WRIT

3. This Petition is presented pursuant to Article V, Section 4(2) of the Florida Constitution, Rule 4.1 of the Florida Appellate Rules, and Florida Statute 366.10.

RECORD OF PROCEEDINGS

4. This Petition is unaccompanied by the Transcript of Record and Brief. In lieu thereof, it is accompanied (along with the filing fee) by a Motion for Extension of Time to File Transcript of Record and Brief. As stated therein, Mr. R. M. C. Rose, counsel for the Public Service Commission, has agreed to stipulate (should this be necessary) that no objection will be offered to the granting of the Motion.

STATEMENT OF CAUSE

5. The following is a statement of the cause:

a. Without an officially certified Transcript, Petitioners are unable to properly refer to the record pages below and therefore beg the Court's indulgence. The Florida Power & Light Company (hereinafter called FP&L) applied to the Florida Public Service Commission (hereinafter called PSC) for approval of an Agreement with the incorporated City of Homestead (hereinafter called Homestead) of a Service Area Agreement entered into on August 7, 1967. The Agreement concerned an area on the

southern part of Dade County, Florida, adjacent to and outside of Homestead's boundaries. It called for the transfer of approximately [illegible] commercial and 66 residential electrical accounts from Homestead (which owns its own municipal light plant) to FP&L. *None of these accounts has protested the transfer.*

b. Petitioners herein are representative of the approximately 35 commercial and 363 residential electrical accounts who will, under the proposed Agreement, be switched from FP&L to Homestead electrical service. As pointed out in their Petition for Reconsideration, Correction, and Amendment of Order No. 4285, or, in the Alternative, for Rehearing (hereinafter called Petition for Reconsideration, etc.), Petitioners speak for themselves and in behalf of more than one hundred other persons directly affected with them by the Agreement.

c. A Hearing was had at 10:00 A.M. of November 8, 1967 at the Council Chamber, City Hall, Homestead, Florida, before PSC Chairman, WILLIAM T. MAYO, and Commissioner EDWIN L. MASON. Commissioner JERRY W. CARTER was absent.

d. As pointed out in Chairman Mayo's dissent (Order #4285) seven (7) public witnesses appeared in opposition to approval of the Agreement, none in favor of it. "The testimony indicates a dissatisfaction with the service being rendered, or to be rendered, by the City of Homestead and a complete satisfaction of the services being rendered and the rates being charged by Florida Power and Light."

e. Chairman Mayo's dissent further highlighted the fact stressed at the Hearing that the "customers of

Homestead beyond the corporate limits of the City have no voice at all as to the policies and rates charged them by the City because they are not eligible to vote in City elections. Presently, those customers that are to be transferred to Homestead are being served by the applicant and have recourse to this Commission."

f. The Hearing disclosed that Homestead's power rates were considerably higher than FP&L's in the past and that "probably $285,000.00" (after deducting for street lighting, administrative, and other charges) was returned to City of Homestead general revenues by its light plant during the latest fiscal year. This composed a very substantial portion of the municipal budget of "slightly over a million (dollars)."

g. All parties concerned agreed that PSC exercised rate making and service jurisdiction over FP&L but not over Homestead's municipal power plant.

h. By a 2-1 vote, the PSC approved FP&L's application, Chairman Mayo dissenting (Order #4285, dated December 1, 1967). Then, by the same 2-1 vote it denied Reconsideration, etc. (Order #4308, dated January 17, 1968). Hence this Petition for Certiorari.

REASONS RELIED ON FOR GRANTING OF WRIT

6. a. Certain very momentous questions are posed herein. In different form they were posed at the Hearing itself and in the Petition for Reconsideration, etc.

b. Of broadest import, probably, is the query "Is due process being served without a full airing of the questions raised before this Court?"

c. Homestead is operating its municipally owned power plant in a proprietory capacity as a monopoly purveyer of electricity. A municipally owned utility, under Florida Statute 366.11, is not subject to the other provisions of Chapter 366. This Court has never been called upon, so far as Petitioners can determine, to decide whether 366.11 is unconstitutional in part, as Petitioners contend.

d. It seems fundamental that if Petitioners are to be forced to purchase electric power from a municipally owned plant under the control of elected officials in whose election they have absolutely no voice, certain basic safeguards should be furnished them under Sections 1, 2, 4, 15, 24, and other applicable provisions of the Florida Constitution, and under pertinent provisions of the Constitution of the United States of America.

e. None of the foregoing should detract from the other matters raised at the Hearing, in the Petition for Rehearing, etc., and in Chairman Mayo's dissent. The Reporter's Transcript of the Proceedings will make clear that Petitioners gave a spontaneous, unorganized presentation in their own behalf. Only afterwards did they proceed to retain counsel and to rally community support.

f. Despite this, of the two PSC members present, one dissented from the majority ruling that the proposed Agreement should be approved. Chairman Mayo's well-reasoned dissent clearly shows that facts, precedent and simple justice require rejection of the Agreement.

g. In summary, then, Petitioners seek reversal on the facts and the law; or, in the alternative, for opportunity to clearly demonstrate before the full PSC, after proper

notice, why the proposed Agreement should not be allowed to stand. In the latter event, Petitioners intend to clearly demonstrate how and why FP&L's service, rates, administration, and other relevant aspects of operation are so clearly superior to that of Homestead's.

Respectfully submitted on this 13th day of March, 1968.

Signed

IRVING PESKOE, for him and for ROBERT L. LEWIS, Attorneys for the named Petitioners and others directly affected.
100 N. Krome Avenue
Homestead, Florida 33030
Phone 247-1435

I HEREBY CERTIFY that a true copy of the above and foregoing Petition for Writ of Certiorari to the Florida Public Service Commission was served upon the following parties and others interested in this cause, by first class mail on this 13th day of March, 1968, The Florida Public Service Commission marked for the attention of B. Kenneth Gatlin, Esq., Chief Rate Counsel, and R.M.C. Rose, Esq., Staff Counsel, Tallahassee, Florida, 32304; to the Honorable H. E. Carraway, Administrative Secretary of the Florida Public Service Commission, Tallahassee, Florida 32304; to the Honorable William T. Mayo, Chairman, Florida Public Service Commission, Tallahassee, Florida 32304; to Phillip Goldman, Esq., Scott, McCarthy, Steel, Hector & Davis, Attorneys for Applicant Florida Power and Light Company, First National Bank Building, Miami, Florida; and to Vernon Turner, Esq., City Attorney, City of Homestead, 830 N. Krome Avenue, Homestead, Florida, 33030.

Signed

IRVING PESKOE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1252

MRS. JOHN DE RAISMES STOREY, et al.,
Petitioners,

vs.

WILLIAM T. MAYO, Chairman, and EDWIN L. MASON, and JERRY W. CARTER, Commissioners, as and constituting the FLORIDA PUBLIC SERVICE COMMISSION, et al.,
Respondents.

RESPONDENT FLORIDA POWER & LIGHT COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

INTRODUCTORY STATEMENT

This is a petition to this Court by Mrs. John De Raismes Storey, et al., seeking the issuance of a writ of certiorari to review the judgment of the Supreme Court of Florida entered on November 6, 1968 and reported in 217 So.2d 304. Although petitioners in this proceeding do not

designate Florida Power & Light Company (hereinafter sometimes referred to as the Company) as a respondent, the record reflects (Pet.App. p. 4) that the Company was a party in the Supreme Court of Florida and the Company, therefore, assumes that it has status to file a brief in this Court.

In this brief all emphasis is supplied unless otherwise indicated and the following symbols will be used:

"Pet.App." is the reference to petitioners' Appendix;

"R." is the reference to the record which was before the Supreme Court of Florida, which petitioners' counsel informs us has been transmitted to this Court.

QUESTION PRESENTED FOR REVIEW

Whether the Petitioners Have Any Right (Protected by the Fourteenth Amendment to the Federal Constitution) to Service by a Particular Utility Merely Because They Deem It Advantageous to Themselves.

STATEMENT OF THE CASE

Petitioners' statement is argumentative and incomplete. The Company, therefore, restates the case as follows.

This action was initiated on September 20, 1967, by an application of the Company for approval of a territorial agreement with the City of Homestead relative to service areas (R. 3-13).

Thereafter, on October 9, 1967, the respondent-Commission published a notice of hearing advising the public with respect to the hearing which was held in the City of Homestead (R. 14).

All persons subject to the agreement had previously been contacted by either the Company or the City, so there is no question as to the adequacy of notice (R. 117).

On November 8, 1967, a public hearing was held by the Commission. At that time the Company established by uncontroverted evidence that the proposed territorial agreement was in the public interest in that it minimized, and at times eliminated, unnecessary and uneconomical duplication of plant and facilities, which duplicate facilities resulted in higher rates that the public must pay for essential services (R. 30). The Company further established that the territorial agreement would promote safety in that it would enable the Company and the City to avoid congestion of facilities [duplication, commingling, crisscrossing, overlapping, and paralleling of lines (R. 32)] on the streets and public ways. It was further established that implementation of the territorial agreement would enable the Company and the City to further maintain a higher quality of service and would enable the Company and the City to avoid bad customer relationships (R. 31).

The evidence of the City was to the same effect (R. 60-64).

As previously noted, the foregoing evidence was uncontroverted.

At the hearing seven protestants appeared for the purpose of objecting to the transfer of certain customers incident to the territorial agreement. However, none of the protestants contended that the agreement was not in the public interest (R. 86-102). In fact, one of the protestants expressly recognized the need for the elimination of duplicate facilities (R. 96). The theme of the protestants was that the Company gave better service and had a better rate structure and that the duplication of facilities should be eliminated by transferring everybody to the Company.

The Company was most gratified by the reaction of the protestants and is indeed sorry to lose even a single customer. However, as the record here reflects, the territorial agreement in question had been under negotiation for many years and the only way that the Company was able to work out an agreement with the City of Homestead was to surrender some of the customers in the area of duplicate facilities. This agreement, therefore, represents a compromise, though unpalatable to some, which was necessary to achieve an end beneficial to the greatest number of people.

In due course, on December 1, 1967, the Commission entered its Order No. 4285 approving the territorial agreement (Pet.App. pp. 32-39, R. 114-122).

The rationale of the Commission's Order (Pet.App. p. 34, R. 116-117) is hereinafter set forth:

> "Testimony adduced before the Commission indicated that there are presently duplicate electrical facilities maintained by the Company and the municipality in certain areas in Dade County where the facilities of the two utility systems are contiguous or coincide. In view of the anticipated growth of the areas embraced in the proposed territorial agreement, further duplication of service is to be anticipated unless separate service areas are agreed to by the two utility systems. Further, the overlapping of these service areas naturally creates wasteful expenditures on the part of each of the utility systems in installing and maintaining duplicate transmission and distribution lines. The elimination of duplicate lines would enhance the appearance of the involved areas. Duplicate lines result in an unnecessary hazard to the safety of employees of the utility systems and to the general public, since the lines of one utility necessarily cross the lines of the other at certain points. Further, the witnesses for the two utility systems agreed that by eliminating the necessity for duplicate service in the affected

areas, such utility would be enabled to develop and plan its respective future growth in a more orderly manner in order to adequately provide for the service needs of the rapidly growing area of Dade County. In short, the parties to the proposed territorial agreement concur that it will result in the provision of high quality electric service to all of the customers on both systems."

On December 20, 1967, the petitioners filed a Petition for Reconsideration (Pet.App. pp. 40-43, R. 122-127) which was denied by Order No. 4308 on January 19, 1968 (R. 128-129).

The petitioners then filed a Petition for Certiorari with the Supreme Court of Florida (Pet.App. pp. 46-51).

In due course the Supreme Court of Florida affirmed[1] (Pet.App. pp. 1-13, 217 So.2d 304).

The gravamen of the Supreme Court of Florida's decision is as follows (Pet.App. p. 9):

"An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself. If he lives within the limits of a city which operates its own system, he can compel service by the city. However, he could not compel service by a privately-owned utility operating just across his city limits line merely because he preferred that service. In the instant situation, these petitioners have not been denied equal protection because they occupy the same status as all users of the municipal power. In the event of excessive rates or inadequate service their appeal under Florida law is to the courts or the municipal council."

---

1. The decision of the Supreme Court of Florida which is set forth in petitioners' Appendix also confirms the factual recitation heretofore set forth in the Statement of the Case.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. No substantial federal question is raised by petitioners' Petition for Writ of Certiorari.

It has long been settled by this Court and really requires no citation of authority that this Court has no jurisdiction to review a state court decision unless it appears affirmatively from the record that a substantial federal question is not only presented to this Court but was presented for decision to the highest court of the state having jurisdiction. It is also necessary that the federal question be actually decided by the state court involved. See *Southwestern Bell Telephone & Telegraph Co.* v. *State of Oklahoma,* 303 U.S. 206, 82 L.Ed. 751, 58 S.Ct. 528; *Grisanti* v. *City of Cleveland, Ohio,* 371 U.S. 68, 9 L.Ed.2d 119, 83 S.Ct. 111; *Wetzel* v. *Ohio,* 371 U.S. 62, 9 L.Ed.2d 26, 83 S.Ct. 111; *Seaboard Air Line Railway* v. *Watson,* 287 U.S. 86, 77 L.Ed. 180, 53 S.Ct. 32.

In this cause it is respectfully submitted that no substantial federal question has been presented to this Court. In fact, petitioners' assertion of a federal question appears to be so unsubstantial as not to really require further argument.

Significantly, the petitioners in their jurisdictional statement are unable to point to any authority in support of their position.

Petitioners primarily rely on this Court's decision in *Shelley* v. *Kraemer,* 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836. With all due respect to learned counsel for petitioners, the *Kraemer* case, *supra,* relates to what constitutes state action in the field of enforcing restrictive covenants. This would seem to be completely irrelevant to the issue presently before this Court.

As the Supreme Court of Florida pointed out (Pet.App. p. 9):

> "An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself. If he lives within the limits of a city which operates its own system, he can compel service by the city. However, he could not compel service by a privately-owned utility operating just across his city limits line merely because he preferred that service. In the instant situation, these petitioners have not been denied equal protection because they occupy the same status as all users of the municipal power. In the event of excessive rates or inadequate service their appeal under Florida law is to the courts or the municipal council."

The foregoing would seem to dispose of petitioners' contention that they have somehow been denied equal protection because they can no longer purchase power from Florida Power & Light Company.

Petitioners argue that they have been denied equal protection because the territorial agreement tends to remove them from regulatory protection. As the Supreme Court of Florida pointed out, they still have recourse, where necessary, to the municipality or to the courts. Under the territorial agreement they are treated the same as all other members of the class.

II. In addition, petitioners did not raise the question of the validity of Section 366.11, Florida Statutes, before the State Supreme Court.

In their petition before this Court, petitioners urge that Section 366.11, *Florida Statutes,* is unconstitutional. This is the statute which exempts municipal-owned utilities from regulation by the Florida Public Service Commission.

Not only does the petition fail to raise a substantial federal question with respect to the statute, but a perusal of the decision of the Supreme Court of Florida (Pet.App.

pp. 1-13) as well as the decision of the Florida Public Service Commission (Pet.App. pp. 32-39) reveals that the validity of this statute was never presented to those bodies. See *Whitney* v. *State*, 274 U.S. 357, 71 L.Ed. 1095, 47 S.Ct. 641; see also *Simmerman* v. *State*, 116 U.S. 54, 29 L.Ed. 535, 6 S.Ct. 333.

Petitioners' "string citation" set forth on page 10 of the petition is so inapposite as to not require further response. The cited cases simply have no bearing on the issue here before the Court.

III. No public interest will be served by permitting review of the lower court's decision.

As reflected by the Florida Public Service Commission's order and the decision of the Supreme Court of Florida, the public interest here is served by the approval of the territorial agreement involved. The rights of the petitioners are adequately protected and no public interest will be served by permitting a review of the Supreme Court of Florida's decision.

CONCLUSION

For the foregoing reasons Florida Power & Light Company requests that petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

PHILLIP GOLDMAN
14th Floor First National Bank Building
Miami, Florida 33131
Counsel for Respondent, Florida Power & Light Company

SCOTT MCCARTHY STEEL HECTOR & DAVIS
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Of Counsel

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Supreme Court, U.S.
FILED
MAY 12 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

October Term, 1968

No. 1,252

MRS. JOHN DE RAISMES STOREY, et al.,
Petitioners,

vs.

WILLIAM T. MAYO, Chairman, and EDWIN L. MASON, and JERRY W. CARTER, Commissioners, as and constituting the FLORIDA PUBLIC SERVICE COMMISSION, et al.,
Respondents.

RESPONDENT CITY OF HOMESTEAD, FLORIDA BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORAI TO THE SUPREME COURT OF FLORIDA

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in the

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October Term, 1968

No. 1,252

MRS. JOHN DE RAISMES STOREY, et al.,
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Respondents.

RESPONDENT CITY OF HOMESTEAD, FLORIDA BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORAI TO THE SUPREME COURT OF FLORIDA

INTRODUCTORY STATEMENT

This is a petition to this Court by Mrs. John De Raismes Storey, et al., seeking the issuance of a writ of certiorari to review the judgment of the Supreme Court of Florida entered November 6, 1968 and reported in

217 So.2d 304. The Petitioners do not designate the City of Homestead, Florida (hereinafter referred to as the City) as a respondent, however, the record clearly indicates (Pet. App. p4) that the City was a party in the Supreme Court of Florida and has a clear interest in the litigation. The City assumes by virtue of the foregoing, and in light of the service on the City of the Petition for Writ of Certiorari to the Supreme Court of the United States that it has proper status to file this brief.

All emphasis is supplied unless otherwise indicated.

"Pet.App." is the reference to petitioners' Appendix.

"R" is the reference to the record which was before the Supreme Court of Florida, which we are informed has been properly transmitted to this Court.

QUESTION PRESENTED FOR REVIEW

WHETHER PETITIONERS HAVE ANY RIGHT AS PROTECTED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION TO SERVICE BY A PARTICULAR UTILITY MERELY BECAUSE OF PERSONAL PREFERENCE.

STATEMENT OF THE CASE

Petitioners' statement is incomplete and is limited to testimony deemed favorable to petitioners. The City restates the case as follows:

This action was initiated on September 20, 1967 by the filing of an application on behalf of the Company, before the Florida Public Service Commission, for approval of a territorial agreement previously entered into with the City of Homestead, a Florida municipal corporation, relative to the establishment of service areas (R. 3-13).

The Commission on October 9, 1967 published a notice of hearing advising the public with respect to the public hearing which was to be held in the City of Homestead for the purpose of considering the application of the Florida Power & Light Company for approval of a service area agreement with the City for the distribution and sale of electricity (R. 14).

All individuals subject to the agreement had previously been contacted by either the Company or the City (R. 58, 59, 112). The Commission specifically found in its Order that the affected customers had been contacted and the nature and effect of the proposed agreement had been explained to the customers (R. 117).

On November 8, 1967 a public hearing, pursuant to the aforesaid notice, was held by the Commission in Homestead, Dade County, Florida. The City and the Company established by testimony and documentary evidence that the territorial agreement being considered for approval by the Commission was in the highest public interest, by reducing or eliminating unwarranted, unnecessary and uneconomical duplication of plants and facilities, which facilities, if duplicated, could only result in excessive cost for both the Company and the City, thus resulting in

the public's payment of higher costs for essential services (R. 30). Witnesses for the Company and the City both established and the public witnesses offered no contrary testimony, that the territorial agreement would promote safety and better services, in that it would provide means by which the Company and the City could avoid duplication, overlapping and paralleling of electrical lines on the public streets and ways, and would materially contribute to the esthetic value of the service area (R. 32, 60). Testimony further established that the agreement would enable the City and the Company to plan the future capabilities of the electrical system so that they might program in advance the development of their respective areas, rather than to be forced into the purchase of expensive plant and line facilities for the purpose of competing, rather than providing, efficient service (R. 60-64). Failure of the Company and the City to be able to plan an orderly expansion of plant and distribution facilities can only result in excessive cost to both parties, and resultant higher costs to the public being served. The service area agreement being considered by the Commission was discussed by the Company and the City for more than three years and was subject to intense negotiations for the period of nearly one year (R. 60-64). At the public hearing, seven individual protesters appeared and registered their objection to the transfer of themselves and certain customers included in the territory subject to the proposed agreement. No testimony was offered by any of these parties to the effect that the agreement between the Company and the City was not in the general public interest (R. 86-102). One of the principle objectors stated that they realized the necessity of eliminating the parallel lines, crossed lines and other duplicating facilities (R. 96).

The City of Homestead has been operating an electrical generating and distribution system for many years and has supplied customers both within and without its corporate limits. In addition to its electrical generating and distribution system, the City operates and maintains a sewerage disposal system and a water supply and distribution system (R. 62, 63, 104). The requirement of future planning in the development of the electric plant and distribution systems of the City, as well as its other public utilities, requires that the general area to be served by the City be established, rather than to allow a chaotic and destructive competitive warfare to exist between the Company and the City where their utility services overlap or merge (R. 60). For the last 43 years, the City of Homestead has never increased their electrical rates to the persons receiving electrical utility service from the City (R. 103-104). In some categories of service, the Company's rates are lower than the City's, and in other categories, the Company's rates are higher (R. 42, 43).

Concluding the said hearing, the Commission entered its Order No. 4285 approving the territorial agreement on December 1, 1967 (R. 114-122) (Pet. App. pp 32-39). The summary of the Commission's Order (R. 119) (Pet. App. p 37) is as follows:

> "In summary, this Commission finds that the evidence presented shows a clear justification and need for the territorial agreement for which approval is sought. The approval of this agreement should better enable these utilities to provide the best possible utility services to the general public at a very reasonable price."

On December 20, 1967, the Petitioners filed a Petition for Reconsideration (R. 122-127 & Pet. App. pp. 40-43), which was denied by the Commission as evidenced by Order No. 4308, which Order was entered on January 19, 1968 (R. 128-129).

The Petitioners thereafter filed a Petition for Certiorari with the Supreme Court of Florida (Pet. App. pp 46-51).

Following submission of briefs and after oral arguments the Supreme Court of Florida affirmed the Order of the Florida Public Service Commission. (Pet. App. pp 1-3, 217 So.2d 304).

A Petition for Rehearing was filed by the Petitioners and was denied by the Supreme Court of Florida on December 12, 1968 (Pet. App. p 19).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

I. No violation of equal protection of law indicated.

The Supreme Court of Florida (Pet. App. p 9) effectively stated the established law as follows:

> "An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself. If he lives within the limits of a city which operates its own system, he can compel service by the City. However, he could not com-

> pel service by a privately owned utility operating just across his city limits line merely because he preferred that service. In the instant situation, these petitioners have not been denied equal protection because they occupy the same status as all users of the municipal power. In the event of excessive rates or inadequate service their appeal under Florida law is to the courts or the municipal council."

The Petitioners are being treated exactly the same as all other persons in their class and the designation of their class is not arbitrary or discriminatory. To infer that they will not receive equal treatment because they do not reside within the corporate boundaries of the city, is not supported by the record nor the actions of the city for nearly one-half century. Uncontradicted testimony at the public hearing disclosed that the city had never raised its rates in more than forty-three (43) years of operation of the electric system (R. 103-104). All customers of the city electric system have equal right to appear before the City Council and, if deemed necessary to protect their interest, to seek redress in the courts.

The City Council of Homestead is a public body, and, as such, acts only after full public meetings, discussions and an opportunity for all to be heard. Cities in Florida are not isolated entities but are surrounded by suburban area dependent upon the cities for business services, streets, police and fire protection and all attendent services rendered by municipalities. Cities cannot exist separate and apart from the surrounding territory but are dependent upon the good will of those pesons residing in adjacent areas, likewise such persons are dependent

upon the cities for the services available within its boundaries. Members of the public affected by the agreement herein approved will have a direct and positive influence upon residents of the city as well as the elected officials. Electric rates have always been fixed by the City Council in its function as a public body (R. 104).

Since the inception of the electric production and distribution system of the city, customers both within and without the municipal boundaries have been fairly and equally served. The fact that during the past fifty years, with all the economic variations, the city has consistently reduced its charges for electrical energy, has applied the same rates to all persons served by the utility, is indicative of the equality and fairness of the city.

II. No federal question raised.

Petitioners attempt to invoke the jurisdiction of this Court and yet produce no authority in support of their contention. The list of citations following their argument does not appear to be relevant to subject matter. Emphasis is given to the case of **SHELLEY v. KRAEMER**, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, 3 ALR 2d 441 (1948) which is a decision dealing with restrictive covenants on the basis of race. The other cases cited deal primarily with civil rights, racial or criminal matters and do not appear to have reasonable application herein. Respondent, Florida Power and Light Company, has effectively presented this matter in its brief in opposition and subject Respondent adopts said arguments and citation of authorities.

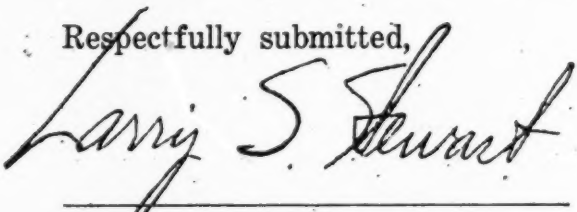
III. Section 366.11, Florida Statutes is constitutional.

The Respondent City of Homestead adopts the argument and law cited by the Respondent Florida Power and Light Company as contained under Section II, page 7 of its brief and in addition thereto, would submit that the Supreme Court of the United States has decided this specific question and upheld the constitutionality of such a provision in the case of **SPRINGFIELD GAS & ELECTRIC CO. v. SPRINGFIELD,** 292 Ill. 236, 126 NE 739, 18 ALR 929, affirmed in 257 U.S. 66, 66 L.Ed. 131, 42 S.Ct. 24. The opinion therein written by Mr. Justice Holmes, upheld the legislative classification between private and public utilities against the objection that it denies equal protection of the laws or operates as an unjust and unlawful discrimination. See also **C. W. PENNINGTON, et al, v. TOWN OF SUMNER et al,** 222 Iowa 1005, 270 NW 629, 109 ALR 355 (1936).

CONCLUSION

By virtue of the foregoing reasons and authority no public interest will be served by permitting review of the decision of the Supreme Court of Florida, affirming the Order of the Florida Public Service Commission. The City of Homestead respectfully requests that Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that on this 9th day of May, 1969, as Attorney for Respondent, I mailed one copy each of the foregoing Brief of Respondent, City of Homestead, by first class postage prepaid, except for those noted below as going via air mail prepaid, to all the respective attorneys of record as follows:

To: Irving Peskoe, Attorney for Petitioners, 1000 N. Krome Ave., Homestead, Florida 33030.

To: Philip Goldman, Esq., Scott, McCarthy, Steel, Hector and Davis, Attorneys for Florida Power & Light Company, First National Bank Building, Miami, Florida 33131

To: Prentice P. Pruitt, Chief Staff Counsel, Florida Public Service Commission, 1700 South Adams Street, Tallahassee, Florida 32304, via Air Mail.

To: Lewis W. Petteway, General Counsel, Florida Public Service Commission, Tallahassee, Florida 32304 via Air Mail.

Signed:

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